No. 12,268

IN THE

United States Court of Appeals

For the Ninth Circuit

HERRIE BREWSTER,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for writ of habeas corpus. (Tr. 43-44.) The Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28 U.S. C.A., Section 2253.

STATEMENT OF THE CASE.

The appellant, a military prisoner, confined at the United States Penitentiary, at Alcatraz, California, filed a petition for writ of habeas corpus in which he alleged, in substance, that his detention by the appellee, the Warden of the said prison, is illegal because he was twice placed in jeopardy for the same offense, in contravention to the Fifth Amendment to the Constitution. Thereafter the Court below issued an order to show cause (Tr. 8), and the appellee filed a return to order to show cause. (Tr. 9-35.) The appellant thereupon filed a motion to expunge from the record appellee's Exhibit A-7, which was attached to the return (Tr. 36-37), and likewise filed a traverse to return to order to show cause. (Tr. 38-42.) The matter was then submitted and the Court below, without granting appellant's motion to expunge appellee's Exhibit A-7, as aforesaid, entered its order denying petition for writ of habeas corpus. (Tr. 43-44.)

From this latter order appellant now appeals to this Honorable Court. (Tr. 45.)

QUESTION.

Was the appellant twice placed in jeopardy for the same offense, contrary to the provisions of the Fifth Amendment to the Constitution?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

In denying appellant's application for writ of habeas corpus the Court below entered the following order:

> "Upon the filing of the petition for the writ of habeas corpus herein, the Court ordered Respondent to show cause why the writ should not issue. Upon the return of the respondent thereto and the traverse of petitioner, the petition has been submitted.
>
> "It may be determined upon the record now before the Court, inasmuch as no issue of fact requires resolution.
>
> "Petitioner's claim, as asserted in the petition, is that he was put in jeopardy twice for the same offense contrary to the provisions of the Fifth Amendment to the Constitution. It is true that he was retried for the same offense after the reviewing military authority had so ordered. But this was pursuant to Article 50½ Articles of War 10 USC 1522. Article 50½ is a proper and constitutional exercise of Congressional authority. *Sanford v. Robbins,* 5 Cir. 115 Fed. (2d) 435, 439. Cert. Den. 312 U.S. 697.
>
> "The claim of 'double jeopardy' is without merit. *Palko v. Connecticut,* 302 U.S. 320, 328; *In re Wrublewski,* 71 Fed. Supp. 143, affirmed *Wrublewski v. McInerney,* 9 Cir. 166 Fed. (2d) 243; *Ex parte Benton,* 63 Fed. Supp. 808.

"The petition is denied and the proceeding is dismissed.

Dated: April 28, 1949.

LOUIS E. GOODMAN,

United States District Judge."

(Tr. 43-44.)

Appellant was originally tried and convicted of murder by general court-martial, which conviction was set aside and a rehearing ordered by the reviewing authority. The rehearing, or retrial, also resulted in his conviction and sentence which he is now presently serving. In connection with appellant's allegation of a prior trial for the same offense, it should be noted that the action taken by the reviewing authority on June 29, 1943 (appellant's Exhibit A-1, Tr. 14), in disapproving the initial sentence and ordering a rehearing, or retrial, was taken pursuant to statutory authority contained in the fourth paragraph of Article of War 50½ (Title 10 U.S.C.A. Section 1522), which provides in pertinent part as follows:

> "* * * When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a Court composed of officers not members of the Court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first Court, and no sentence in excess of or more severe than the original sentence

shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding. * * *"

The mentioned action on June 29, 1943, was not "final action" within the meaning of Article of War 40 (Title 10 U.S.C.A. Section 1511), which provides in appropriate portion as follows:

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case. * * *"

With particular reference to the plea of double jeopardy, attention is called to this pronouncement of the Supreme Court of the United States, in *Palko v. Connecticut,* 302 U.S. 320, at page 328:

"Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions? The answer surely must be 'No'. * * * It (the statute) asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. * * *

"If the trial had been infected with error adverse to the accused, there might have been re-

view at his instance, and as often as necessary to purge the vicious taint. * * *

"The conviction of appellant is not in derogation of any priviliges or immunities that belong to him as a citizen of the United States."

With further reference to the plea of double jeopardy as raised by a member of the military, appellee calls attention to the language of this Honorable Court, in *Wrublewski v. McInerney,* 166 Fed. (2d) 243, at page 245, affirming the decision of the District Court reported in 71 Fed. Supp. 143:

"(3) The constitutional guaranty against double jeopardy concerns itself with matters of substance, not with ingeniously assembled shadows. Petitioner has nothing of substance to complain of. He would appear to have emerged from this chapter of errors in a more favorable position than he would have been in had the errors not been committed."

See also *Wade v. Hunter,* 336 U.S. 684, wherein the Supreme Court of the United States, in affirming the decision of the Court of Appeals reversing the judgment of the District Court which had ordered petitioner's release on the ground that his conviction by court-martial had violated the double-jeopardy provision of the Fifth Amendment, stated at pages 688 and 689, as follows:

"* * * The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such

a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. * * *"

In *Ex parte Benton* (D.C. N.D. Cal.) 63 Fed. Supp. 808, 809, 810, the Court declared:

"It is not questioned, as indeed it could not be by virtue of an unbroken line of authority, that civil courts cannot review the judgments of courts martial, on habeas corpus, if the military had jurisdiction to try the offender and if the sentence of the Court or commission was within its power to pronounce. *United States v. Grimley,* 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636; *Swaim v. United States,* 165 U.S. 553, 17 S. Ct. 448, 41 L. Ed. 823; *Mullan v. United States,* 212 U.S. 516, 29 S. Ct. 330, 53 L. Ed. 632; *Ex parte Mason,* 105 U.S. 696, 26 L. Ed. 1213; *Ex parte Reed,* 100 U.S. 13, 25 L. Ed. 538; *Carter v. McClaughry,* 183 U.S. 365, 22 S. Ct. 181, 46 L. Ed. 236."

CONCLUSION.

It being apparent, from the foregoing authorities cited by the Court below in its order as well as by the appellee in his argument herein, that appellant's

claim of "double jeopardy" is without merit, and it being further apparent that the court-martial which retried the appellant for the offense of which he now stands convicted had jurisdiction over his person, and that the sentence which appellant is now serving was within the power of the military to pronounce, it follows that his detention by the appellee is legal, and that, accordingly, the order of the Court below denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,
August 19, 1949.

Respectfully submitted,

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